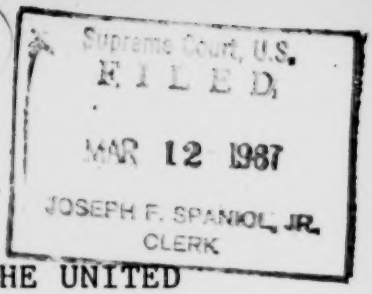
86 1564



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE SPENCER COUNTY CLERK,
SPENCER COUNTY AUDITOR,
SPENCER COUNTY COUNCIL, AND
THE SPENCER COUNTY BOARD
OF COMMISSIONERS,
PETITIONERS

v.

B & M COAL CORPORATION,
RESPONDENT

and

UNITED MINE WORKERS OF
AMERICA AND DAVID R. NORRICK,
INDIVIDUALLY AND AS A MEMBER
OF THE UNITED MINE WORKERS
OF AMERICA, ET AL.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

JACK R. ROBINSON
ATTORNEY FOR PETITIONERS
122 SOUTH THIRD STREET
ROCKPORT, INDIANA 47635
TELEPHONE (812) 649-5011

QUESTION PRESENTED FOR REVIEW

Whether the County's retention of interest earned from funds deposited with the Clerk of the Circuit Court of the County, as permitted by Indiana statute, was a "taking" prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution where the interest would be the only return to the County for the services it renders.

TABLE OF CONTENTS

	PAGE
Opinions Below.	2
Jurisdiction.	3
Question Presented.	3
Statute Involved.	4
Constitutional Provisions Involved.	4
Statement of Case	6
Statement of Facts Material to Issue.	14
Reasons for Granting Writ . . .	24
Conclusion.	37

Appendix A

Opinion of the Supreme Court of Indiana of December 12, 1986	A1
Opinion of the Court of Appeals of Indiana of July 8, 1985.	A20
Judgment of May 24, 1984 entered in Spencer Circuit Court	A42

TABLE OF CASES

	PAGE
Frazer v. Boss, 66 Ind. 1, 17 (1879).	26
Thompson v. State, 425 N.E. 2d 167, app. dism., 459 U.S. 806, 103 S.Ct. 23, 74 L.Ed. 2d 39 (1981).	26,27
Webbs Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980).	31,32, 34,35

STATUTES

Ind. Code Ann. § 5-13-1-3.5 (1979).	4,7,9, 10,13, 14,16, 17,20, 25,31, 35
Ind. Rules of Trial Proc., T.R. 62(D)(2)	26,30
U.S. Const. Amend. 5.	4,10, 11,13, 14,25, 27,32,
U.S. Const. Amend. 14 § 1 . . .	5,25, 27,32,

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE SPENCER COUNTY CLERK,
SPENCER COUNTY AUDITOR,
SPENCER COUNTY COUNCIL, AND
THE SPENCER COUNTY BOARD
OF COMMISSIONERS,
PETITIONERS

V.

B & M COAL CORPORATION,
RESPONDENT

and

UNITED MINE WORKERS OF
AMERICA AND DAVID R. NORRICK,
INDIVIDUALLY AND AS A MEMBER
OF THE UNITED MINE WORKERS
OF AMERICA, ET AL.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners herein pray that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-entitled case on December 12, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported at 501 N.E. 2d 401 (Ind. 1986) and a copy of it and the dissenting opinion are in Appendix A hereto at page A1. The opinion of the Court of Appeals of Indiana is reported at 480 N.E. 2d 227 (App. 1 Dist. 1985) and a copy of it is in Appendix A hereto at page A20. The judgment of the Spencer Circuit Court, being the trial court, is printed in Appendix A hereto at page A42.

JURISDICTION

The judgment of the Supreme Court of Indiana (Appendix A at page A1) was entered on December 12, 1986 on a Petition to Transfer from the Court of Appeals of Indiana. The jurisdiction of the Supreme Court of the United States is invoked under Title 28, United States Code, section 1257(3).

QUESTION PRESENTED

Whether the County's retention of interest earned from funds deposited with the Clerk of the Circuit Court of the County, as permitted by Indiana statute, was a "taking" prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution where the interest would be the only return to the County for the services it renders.

STATUTE INVOLVED

Indiana Code 5-13-1-3.5(b). The clerk of any circuit court of this state may invest any or all of his total moneys on deposit. He shall invest this money in any or all of the kinds of investment permitted in this chapter. He shall credit interest on these investments to the county general fund of his county.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States
Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due pro-

cess of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This is an action originally brought by B & M Coal Corporation (hereinafter referred to as B & M) against the United Mine Workers of America (hereinafter referred to as UMW) and David R. Norrick, et al. with the Spencer County Clerk, Spencer County Auditor, Spencer County Council and Spencer County Board of Commissioners (hereinafter referred to collectively as Spencer County) as intervenors. This action originally involved the issuance of a restraining order and a subsequent proceeding to collect damages resulting from the breach of the restraining order. This matter was

originally tried on June 6 & 7, 1978 in the Spencer Circuit Court and resulted in a judgment being entered against the defendants, UMW and David R. Norrick, et al. This judgment was subsequently appealed by the defendants and resulted in an opinion of the Court of Appeals of Indiana issued on June 4, 1980. This decision affirmed parts of the prior judgment, but remanded certain issues pertaining to damages to the trial court for retrial.

This Petition concerns the cash appeal bond posted by the defendants, the investment of the cash appeal bond by the Spencer County Clerk pursuant to I.C. 5-13-1-3.5(b), and the payment of the interest on the appeal bond by the Spencer County Clerk to the county general fund pursuant to said statute from April 9, 1979 (effective date of

said statute) to February 24, 1982 (date of Judge Plummer's order concerning interest on the appeal bond).

The original judgment in this cause was entered in favor of B & M and against UMW and David R. Norrick et al. in the amount of $173,873.09 plus attorney fees of $10,117.72 on September 21, 1978 by Judge Plummer. On October 25, 1978, Judge Plummer set an appeal bond of $200,000.00. The appeal bond was not specified as a cash bond. On February 27, 1978 Judge Plummer entered an order on motion of defendant staying execution on condition that defendants post $125,000.00 cash with the Clerk on that date and a further sum of $75,000.00 cash within 20 days. The defendants proceeded to post a portion of the cash bond beginning on February 27, 1978.

The Clerk did not invest the cash

bond until approximately May, 1979. She began investing the cash bond at that time because she had learned at a Clerk's Association meeting of a new statute, I.C. 5-13-1-3.5(b), which became effective April 9, 1979, by which she was authorized to invest monies on deposit and credit the interest to the County General Fund.

On February 24, 1982, Judge Plummer entered an "Order Concerning Investment of Cash Appeal Bond". The order was an agreed order between plaintiff and defendants and was petitioned for and signed on the same day. The order required the Clerk to invest the appeal bond, that interest earned be allowed to accumulate in the deposited account and not be paid to the County General Fund, and that the interest which had been paid to the County General Fund be paid back

to the Clerk and invested by the Clerk under the same condition as the appeal bond. The interest that was paid to the County General Fund from the time the Clerk began investing until the date of Judge Plummer's order was $34,440.43.

Spencer County was not a party to the suit and had no actual or constructive knowledge of Judge Plummer's order of February 24, 1982 until after the order was entered. Spencer County subsequently filed its Motion to Intervene and Motion for Relief from Order, and leave to intervene was granted by the trial court on April 20, 1982.

On April 17, 1984 B & M filed a Memorandum of Law with the trial court contending that I.C. 5-13-1-3.5(b) was unconstitutional in that it violated the Fifth Amendment of the U.S. Constitution. On May 1, 1984 Spencer

County filed a Memorandum of Law contending that the statute did not violate the Fifth Amendment of the U.S. Constitution. No further action was taken in this matter until the bench trial on May 24, 1984. Presiding at this trial was the Hon. Edward C. Theobald, Special Judge. B & M and Spencer County presented argument to the court on the issue of whether the statute violated the Fifth Amendment to the U.S. Constitution at the time of trial on May 24, 1984. At the trial Judge Theobald held that the statute did not violate the Fifth Amendment to the U.S. Constitution. The judgment issued by Judge Theobald on May 24, 1984 provided that the County was entitled to retain the interest earned prior to Judge Plummer's order of February 24, 1982. This judgment provided in rel-

evant parts that:

> "Comes now the plaintiff, by counsel, Richard S. Eynon, and Dennis M. Stark. Comes now the defendant, by counsel, David Kelley, and comes now Spencer County Auditor, Board of Commissioners and Spencer Circuit Clerk, by Jack R. Robinson.
>
> Court holds a hearing on issue of interest earned on appeal bond and finds that County shall retain the amount of interest earned from 2-27-79, the date the cash bond was deposited, to 2-19-82, the date of Judge Plummer's Order, in the amount of $34,440.43."

Upon retrial of the damage issue, plaintiffs were awarded judgment against defendants totalling $222,232.43.

B & M timely filed its Motion to Correct Errors which was denied by the trial court on July 26, 1984. The plaintiffs filed their transcript with the Court of Appeals of Indiana on December 10, 1984 and subsequently proceeded with their appeal to the Court of Appeals of

Indiana.

The sole issue addressed by the Court of Appeals of Indiana in its decision was whether I.C. 5-13-1-3.5(b), which allows a county to retain interest accrued on funds deposited with the county clerk, violates the constitutional proscription against governmental appropriation of private property without just compensation. The Court of Appeals of Indiana held the retention of the interest by the county was an impermissible taking under the Fifth Amendment to the U.S. Constitution and that the statute did violate the Fifth Amendment to the U.S. Constitution.

A petition to transfer the cause to the Supreme Court of Indiana was filed and granted. The Supreme Court of Indiana held that Spencer County's retention of the interest earned on the UMW

appeal bond constituted an impermissible taking and violated the Fifth Amendment to the U.S. Constitution, upholding the decision of the Court of Appeals of Indiana. However, the Supreme Court of Indiana further held that I.C. 5-13-1-3.5 (b) was constitutional when applied to funds designed for a public use or impressed with a public interest.

Statement Of Facts Material to Issue

On September 21, 1978, a judgment was entered in the Spencer Circuit Court in this case by the Honorable John M. Plummer, Jr., Special Judge, in favor of respondent B & M and against respondents UMW and David R. Norrick, et al. for the sum of $173,873.09 plus $10,117.72 for attorney fees (R. p. 75). On October 25, 1978, the trial court held a hearing

on the UMW's and other defendants' motion for stay of execution and motion for appeal bond. The court granted the stay of execution until November 20, 1978 and fixed the stay and appeal bond in the amount of $200,000.00 with the bond to be approved by the court on or before November 20, 1978 (R. p. 70). The bond was not specified as a cash bond (R. p. 70). On February 27, 1979 the trial court, on request of the UMW and other defendants, stayed execution of judgment on condition that defendants post $125,000.00 cash of the $200,000.00 bond with the Clerk on that date and the balance of $75,000.00 cash within 20 days from February 27, 1979 (R. p. 69).

The UMW and other defendants deposited the total sum of $160,363.00 with the Clerk of the Spencer Circuit Court beginning February 27, 1979 and ending

April 6, 1979 pursuant to the court orders of October 25, 1978 and February 27, 1979 (R. p. 78, ll. 4-11). This money was held in trust by the Clerk by depositing it in trust accounts in various banks along with other monies held in trust by the Clerk in the ordinary course of her business. (R. p. 78) (R. p. 112, Spencer County Exhibit #1) The money held in trust by the Clerk was not invested by the Clerk in interest bearing accounts and did not earn interest.

I.C. 5-13-1-3.5 was amended on April 9, 1979 by adding section "(b)" and inserting "(a)" at the beginning of the section, and the effective date of the amendment was April 9, 1979. Acts 1979, P.L. 38, Sec. 1. I.C. 5-13-1-3.5 (b) provides as follows:

> (b) The Clerk of any circuit court of this state may invest

> any or all of his total monies on deposit. He shall invest this money in any or all of the kinds of investments permitted in this chapter. He shall credit interest on these investments to the county general fund of his county.

After learning at the Clerk's Association meeting of the amendment to I.C. 5-13-1-3.5 by which clerk of the circuit courts were to invest monies on deposit and after conferring with the State Board of Accounts, the Clerk on or about May 31, 1979 began investing the appeal bond money in certificates of deposit (R. p. 78, ll. 12-30) This investment of the appeal bond money continued until February 24, 1982 (R. p. 79, ll. 28-30) when an order was issued by the trial court through Special Judge Plummer entitled "Order Concerning Investment of Cash Appeal Bond". (R. pp. 67-68) This order was agreed to by both plaintiffs and defendants, as stated in line 7 of

the first page of the order, and no notice of any kind was given to Spencer County prior to the signing of the order as shown by the order. (R. pp. 67-68)

The Order concerning Investment Cash Appeal Bond, entered February 24, 1982, provided in part as follows:

> 3. That the cash bond of $160,363.00 should be deposited by the Clerk of the Spencer Circuit Court in an interest bearing account at the highest possible rate on the condition that the term of commitment of such investment should not exceed six (6) months and should be with a reputable bank.
>
> 4. That any interest earned should be allowed to accumulate in the deposited account and should not be contributed in any way to the general fund of Spencer County, Indiana, nor should the interest accumulated on said deposit be in any way spent or disposed of by the Clerk of the Court.
>
> 5. That the Clerk should be directed within 30 days of this order to account for all sums earned as interest on said Cash Appeal Bond from the date of their deposit with the Court until the

> date of this order and that such Clerk and any other officials of Spencer County as are necessary should be directed within 60 days of this order to repay said amounts earned as interest on the Cash Appeal Bond from the date of its deposit with the Clerk until the date of this order and that said amounts, when repaid, should be deposited in an interest bearing account under same conditions as set forth above.

Upon service of the February 24, 1984 order on Spencer County, the County filed its Motion to Intervene (R. p. 65) and Motion for Relief from Order (R. p. 66) and on April 20, 1982 the trial court granted Spencer County's Motion to Intervene and made Spencer County a party to the suit.

Following the order of February 24, 1982 the bond money was segregated by the Clerk from other funds and all interest earned was retained with the bond money. The sum of $34,440.43 had been

paid into the County General Fund pursuant to I.C. 5-13-1-3.5(b) prior to the issuance of the order. (R. p. 80, ll. 18-30) (R. p. 114, Spencer County Exhibit #1) The money paid into the County General Fund is, of course, not retained from year to year, and any money paid out of the County General Fund must be appropriated by the County Council each year.

The first of the appeal bond money was received by the Clerk on February 27, 1979. This and additional money not related to this case was placed by the Clerk, Bertha Faye Wetherill, into various trust accounts with depository banks in Spencer County. (R. p. 112) This money was then placed in six month money market funds in four county banks with maturity dates between December 3, 1979 and December 7, 1979. (R. p. 112)

Subsequently, investment accounts were maintained in each of the four County depository banks with the funds on deposit being placed in 30 day money market certificates. These certificates were automatically renewable and were maintained in one form or another from January 7, 1980 to and including January 26, 1982. (R. pp. 112-114) After that date, the interest from these funds was segregated pursuant to the court order concerning investment dated February 24, 1982. During the time period from June 3, 1979 through January 26, 1982, there was a total of 103 interest checks processed by the Clerk's office. (R. pp. 112-114) During this time period, there were also records kept by the Clerk's office concerning these investments and the interest monies. This record keeping consisted of filing copies of the

money market certificate in the appropriate file, recording the interest monies receipted and paid in the Clerk's ledger books, the filing of various letters and other correspondence with bank personnel and any other associated bookkeeping and accounting necessary (R. pp. 81-190, Spencer County Exhibit 1). The Clerk was required to confer with attorneys, the State Board of Accounts, give a deposition, appear before the County Commissioners, testify in court and numerous other matters all relating to the appeal bond (R. pp. 81-190, Spencer County Exhibit #1). The Clerk and all of her staff were salaried employees of Spencer County and did not receive any additional compensation for their work in this matter (R. p. 200).

The Clerk stated that she and her staff devoted on the average 20 hours

per month on the management of the appeal bond money (R. p. 197, ll. 1-10). The Clerk stated that she thought that $34,440.43 was not a large enough fee for the work performed by her office in managing and investing the appeal bond money (R. p. 200, ll. 3-16). Following is her specific testimony on the value of her services and the services of her staff:

> Q. Is it your testimony today that the $34,400 figure plus any interest which might have been earned on that is a reasonable fee in light of the services that were provided by your office in managing and investing this money?
>
> Witness: In other words, do you think that the work me and my office did for these last several years would amount to $34,400?
>
> A. I can't put an estimate on my work other than my work as a clerk. I know if I were working for an outside firm I would have charged more.

The Clerk stated that there were no fees charged by the Clerk's office for the management and investment of the appeal bond money and that she was not aware of any fee that could have been charged for the management and investment of the appeal bond money (R. p. 199, ll. 11-30) (R. p. 200, ll. 1-2) other than the interest received on the investment of the appeal bond (R. p. 192, ll. 6-11).

REASONS FOR GRANTING WRIT

The trial court did not err in allowing Spencer County to retain interest money earned on the appeal bond in the amount of $34,440.43 for the period from April 9, 1979, the effective date of I.C. 5-13-1-3.5(b) to February 24, 1982, the date of court order concerning investment of the cash appeal

bond. I.C. 5-13-1-3.5(b), which allows Spencer County to retain the interest monies on the appeal bond earned prior to the court order concerning investment of the bond, does not violate the Fifth and Fourteenth Amendments to the United States Constitution.

Protected Property Right

Interest on monies deposited with the Clerk is not a protected property right. Since it is not a protected property right, there is no violation of the Fifth Amendment and Fourteenth Amendment to the United States Constitution. I.C. 5-13-1-3.5(b) says that "The clerk of any circuit court of this state may (my emphasis) invest any or all (my emphasis) of his total monies on deposit". The clerk is not required to invest the funds deposited with her in interest

bearing accounts, or the clerk could deposit all or part of the funds in interest bearing accounts. The exception to the statute is that the Court could direct the disposition of monies deposited with the Clerk. In the instance of appeal bonds the Court could under Trial Rule 62(D)(2) of the Indiana Rules of Trial Procedure direct the disposition of funds. Since the clerk has the option of investing all, none or part of the monies deposited with her in interest bearing accounts, there is no protected property right to interest on the deposits. The right to recover interest was not a feature of the common law, and in Indiana interest is said to be a "creature of statute". Frazer v. Boss, (1879) 66 Ind. 1, 17. The recovery of interest is not a constitutionally guaranteed right. Thompson v.

State, (1981) ___Ind. App.___, 425 N.E. 2d 167. In Thompson the issue was whether Thompson was entitled to recover interest on his judgment against the State during the appellate proceedings, which was a period of 40 months. The Court of Appeals held in Thompson that Thompson was not entitled to recover interest during the appellate proceedings unless there was a statute that required the recovery. The question in this case is similar to Thompson in that there is a question as to whether a governmental entity is constitutionally required to pay interest on funds held by it in which an individual claims an interest.

Due Process-Waiver

The retention of interest by Spencer County does not violate the Fifth and Fourteenth Amendments to the United

States Constitution for the reason that B & M and the other respondents could have petitioned the Court for an investment order and an order to retain the interest with the bond prior to February 24, 1982, but failed to do so by their own neglect. B & M has waived any claim to the $34,440.43 of interest by its own failure to act. The first appeal bond money was received by the Clerk on February 27, 1979 (R. p. 77, ll. 26-30). I.C. 5-13-1-3.5(b) was passed and became effective on April 9, 1979. Acts 1979, P.L. 38, Sec. 1. The Clerk began investing monies on deposit pursuant to the statute on May 31, 1979 and continued to invest pursuant to the statute until February 24, 1982 when Judge Plummer issued his order concerning investment of the appeal bond (R. p. 112, Spencer County Exhibit #1). B & M and the other

respondents could have filed a petition with the Court on February 27, 1979 or earlier and obtained a court order directing the Clerk to invest the appeal bond and directing the Clerk to credit the interest to the appeal bond. The parties failed to file such a petition until February 24, 1982 when an agreed order was obtained from Judge Plummer. If Judge Plummer has the right to issue the investment order on Febraury 24, 1982 concerning future investment of the appeal bond and crediting the interest to the appeal bond, then he certainly had the right to issue the order on February 27, 1979. B & M and the other respondents should have known that after April 9, 1979 the Clerk had statutory authority to invest monies on deposit and credit the interest to the County General Fund. B & M and the other

respondents could have avoided any money going into the County General Fund after April 9, 1979 by simply obtaining an agreed order from Judge Plummer concerning investment of the appeal bond and the crediting of interest to the appeal bond. This would have been a benefit to both plaintiff and defendants. Instead, they waited, for reasons not evident in the record, until February 24, 1982 to obtain such an order. The trial court has sufficient authority under Trial Rule 62(D)(2) of the Indiana Rules of Trial Procedure to order investment of the appeal bond and determine the disposition of interest on the appeal bond, but B & M simply failed to make any request concerning investment and disposition of interest until February 24, 1982. The retention of $34,440.43 by Spencer County because

of the failure of B & M and UMW to act for the period from February 27, 1979 to February 24, 1982, a period of three years, does not violate due process. The due process of law was available. The respondents waived any claim to the interest.

Webbs Case

On May 31, 1979, the Clerk of the Spencer Circuit Court began investing the appeal bond in certificates of deposit pursuant to I.C. 5-13-1-3.5(b). This statute provides as follows:

> (b) The Clerk of any circuit court of this state may invest any or all of his total monies on deposit. He shall invest this money in any or all of the kinds of investments permitted in this chapter. He shall credit the interest on these investments to the county general fund of his county.

The above portion of the statute became effective on April 9, 1979. The Clerk,

in making the investment and paying the interest into the County General Fund, was following the statute.

Plaintiff argues that the above statute is unconstitutional for the reason that it violates the Fifth and the Fourteenth Amendment to the U.S. Constitution as a taking of private property for public use without just compensation and due process of law. Plaintiff bases its argument on the U.S. Supreme Court case of Webbs Fabulous Pharmacies v. Beckwith, (1980) 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed 2d 358. However, the Webbs case and the statutes involved are distinguishable from the case at hand. Following is the holding in the Webbs case as summarized by the U.S. Supreme Court in the final paragraph of its decision:

> We hold that under the narrow circumstances of this case - where

> there is a separate and distinct state statute authorizing a Clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concedely is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others - Seminole County's taking unto itself, under §28.33 and 1973 Fla. Laws, ch 73-282, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders. (My emphasis)

In Indiana there is not a "separate and distinct state statute authorizing a Clerk's fee 'for services rendered' based upon the amount of principal deposited..." as in Florida. In fact, Indiana has no statute setting forth a fee or fees for the deposit of funds

with the Clerk in the case of an appeal bond. The interest received by Spencer County was the only return to the County for the services it rendered through the Clerk. The U.S. Supreme Court in the Webbs case specifically stated that it expressed no opinion as to the constitutionality of a statute that prescribes a County's retention of interest earned, where the interest would be the only return to the County for Services it renders.

In the Webbs case there was a Florida statute that provided a separate fee for receiving money into the registry of the Court and this fee was a variable percentage of the amount deposited. Indiana has no such fee, or any fee, other than the interest earned.

In the Webbs case the interest earned did not bear a rational relation-

ship to the services provided. In this case the Clerk, Bertha Faye Wetherill, the only witness in the case, testified that she would have charged more than $34,400 for the services provided if she had been working for an outside firm and that she thought the fee was inadequate (R. p. 200, ll. 3-16). Her testimony was not contradicted and was the only testimony on the relationship of the interest earned to the services provided.

Another compelling distinction between the Webbs case and the case at hand is that the Florida statute states that the Clerk of the Circuit Court "shall" invest any deposited funds in interest bearing accounts, and the Indiana statute, I.C. 5-13-1-3.5(b), states that the Clerk "may" invest any or all of his monies on deposit. In

this case the Clerk did not invest the deposited money for the period from February 27, 1979 to May 31, 1979. The parties did not then have a protectable property interest.

In the Webbs case the court specifically ordered that the amount tendered to be paid to the Court's clerk and that the clerk deposit it in an assignable interest bearing account at the highest interest. In the case at hand an investment order was not made until three years after the money was deposited. This is a further indication that the parties did not have a protectable interest and did not use due process of law to protect any claimed interest.

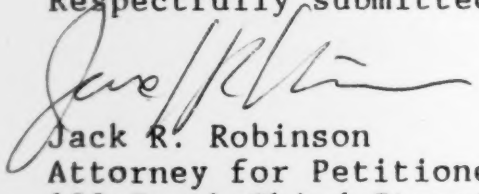
Since the respondents did not have a protected property right and waived any claim to the interest by their own neglect, and since the interest would

be the only return to the County for its services and the return bears a rational relationship to the services performed, this writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,



Jack R. Robinson
Attorney for Petitioners
122 South Third Street
Rockport, Indiana 47635
Telephone No. (812) 649-5011

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE SPENCER COUNTY CLERK,
SPENCER COUNTY AUDITOR,
SPENCER COUNTY COUNCIL, and
the SPENCER COUNTY BOARD
of COMMISSIONERS,
Petitioners

v.

B & M COAL CORPORATION,
Respondent

and

UNITED MINE WORKERS OF
AMERICA and DAVID R. NORRICK,
Individually and as a Member
of the United Mine Workers
of America,
Respondents

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE SPENCER COUNTY CLERK,
SPENCER COUNTY AUDITOR,
SPENCER COUNTY COUNCIL, and
the SPENCER COUNTY BOARD
of COMMISSIONERS,
Petitioners

v.

B & M COAL CORPORATION,
Respondent

and

UNITED MINE WORKERS OF
AMERICA and DAVID R. NORRICK,
Individually and as a Member
of the United Mine Workers
of America,
Respondents

OPINION OF SUPREME COURT
OF INDIANA OF DECEMBER 12, 1986

ATTORNEYS FOR APPELLANT

Dennis M. Stark
201 Washington Street
P.O. Box 1942
Columbus, Indiana 47202-1942
Attorney for B & M Coal Corporation

Richard S. Eynon
Richard S. Eynon, P.S.
555 First Street
P.O. Box 1212
Columbus, Indiana 47202-1212
Attorney for B & M Coal Corporation

ATTORNEYS FOR APPELLEE

David O. Kelley
103 West Main Street
P.O. Box 592
Boonville, Indiana 47601
Attorney for United Mine
Workers of America

Jack R. Robinson
122 South Third Street
Rockport, Indiana 47635
Attorney for Spencer County
Clerk, Spencer County
Auditor, Spencer County
Council and Spencer County
Board of Commissioners

Linley E. Pearson
Attorney General of Indiana

Thomas D. Strodtman
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204
Amicus Attorneys for Appellee

IN THE

SUPREME COURT OF INDIANA

B & M COAL CORPORATION,

Appellant (Plaintiff Below),

No. 74S04-8612-CV-1036
In the Supreme Court

v.

No. 4-884 A 231
In the Court of Appeals

UNITED MINE WORKERS OF AMERICA and DAVID R. NORRICK, Individually and as a Member of the United Mine Workers of America, et al.,

Defendants Below,

THE SPENCER COUNTY CLERK, SPENCER COUNTY AUDITOR, SPENCER COUNTY COUNCIL, and the SPENCER COUNTY BOARD OF COMMISSIONERS,

Appellees (Intervenors Below).

APPEAL FROM THE SPENCER CIRCUIT COURT
The Honorable Edward C. Theobald,
Special Judge
No. C 77-261

ON CIVIL PETITION TO TRANSFER

DICKSON, J.

Intervenors-appellees, the Spencer County Clerk, Spencer County Auditor, Spencer County Council and The Board of Commissioners of the County of Spencer ("Spencer County"), petition to transfer seeking review of an adverse decision of the Court of Appeals. See, B&M Coal Corp v. United Mine Workers (1985), Ind.App., 480 N.E. 2d 227. This case involves a dispute over interest earned on money deposited as an appeal bond with the Clerk of the Spencer Circuit Court and subsequently invested pursuant to Indiana law. Spencer County retained the interest earned on the investment pursuant to Ind. Code § 5-13-1-3.5(b). The trial judge approved of the county's retention of the accrued interest. The Court of Appeals reversed, holding that the litigants retained a protectable property

right in the interest accrued on the invested funds, and thus the county's retention of that interest represented an impermissible taking under the Indiana and United States Constitutions. Petitioner contends that by holding Ind. Code §5-13-1-3.5(b) unconstitutional, the Court of Appeals erroneously decided a new question of law.

As amicus curiae, the State Board of Accounts urges that the decision of the Court of Appeals has essentially destroyed the incentive for county clerks throughout the state to invest moneys on deposit. The State argues that it is possible to address the issue of impermissible taking of private property without declaring the entire statute unconstitutional. We agree.

The material facts of this case were well summarized by the Court of Appeals

as follows:

FACTS

The present dispute is between Spencer County (County) and B & M but it arose out of litigation initiated by B & M against the United Mine Workers (U.M.W.). In December 1977, a labor dispute arose between B & M and its employees affiliated with U.M.W. The U.M.W. called a nationwide strike paralyzing coal mining in Indiana except for non-union operations along the Ohio River. These non-union operations precipitated unprovoked harassment from the union and B & M obtained a temporary restraining order to protect the workers. On January 7, 1978, B & M was raided by aproximately 400 to 500 individuals, in violation of the court order, who caused extensive property damage to the premises. B & M sued the 191 people arrested at the scene and recovered a $173,873.09 judgment plus $10,117.72 in fees. The defendants sought to stay enforcement pending appeal and the court granted the stay on condition that $200,000 be deposited as an appeal bond. The U.M.W. and union members deposited a total of $160,363.00 with the clerk. The Fourth District Court of Appeals affirmed the decision in part but remanded for a further hearing on damages. Cause number 1-379 A 63 (Ind.App.1980) 405

N.E.2d 82. Ultimately, B & M received a total judgment of $222,232.43.

The original deposit of $160,383 by the defendants was invested by the Spencer County Clerk from May 1979 to the time of the bench trial in May 1984. Until 1982, all interest accruing on the fund was deposited by the clerk into the County general fund pursuant to statutory authorization. On February 24, 1982, the court ordered that from this date interest accruing must be returned to the fund. From February 1982 on, interest accordingly was added to the principal and as of the date of the bench trial the bond totalled $191,876.97 which has since been paid to B & M. However, the balance of the judgment remains unpaid and uncollectible.

The parties agree that the only amount at issue is $34,440.43 which represents accrued interest from 1979 until the court's 1982 order. At the 1984 bench trial, B & M argued this amount belonged to it because of its unsatisfied judgment. However, the trial court agreed with the county, which intervened in 1982, and found the $34,440.43 belonged to the county pursuant to a provision in the Indiana Code.

Spencer County contends that it is entitled to retain the $34,440.43 pursu-

ant to Ind. Code § 5-13-1-3.5(b) which provides:

> (b) The clerk of any circuit court of this state may invest any or all of his total moneys on deposit. He shall invest this money in any or all of the kinds of investments permitted in this chapter. He shall credit interest on these investments to the county general fund of his county. [IC 5-13-1-3.5, as added by Acts 1975, P.L. 45, § 1; 1979, P.L. 38, § 1.]

In construing the above statute, we are guided by well known fundamental principles of Indiana law. Every statute stands before this Court cloaked with a presumption of constitutionality. American National Bank and Trust Co. v. Indiana Dept. of Highways (1982), Ind., 439 N.E.2d 1129; State v. Cooper (1839), Ind. 5 Blckf. 258. The statute should be construed so as to ascertain and give effect to the intentions of the legislature expressed in the statute. City

of Indianapolis v. Evans (1940), 216 Ind. 555, 24 N.E.2d 776. However, if there are two possible interpretations of a statute, and by one interpretation the statute would be valid but by the other invalid, the Court should adopt the interpretation which will uphold the statute. Book v. Board of Flood Control Comm'rs City of Indpls. (1959), 239 Ind. 160, 156 N.E.2d 87.

We must determine whether a county's retention of interest earned from funds deposited with the clerk, as permitted by statute, amounted to a "taking" prohibited by our federal and state constitutions. The Fifth Amendment of the Constitution of the United States includes the following prohibition:

> . . .Nor shall private property be taken for public use, without just compensation.

Similarly, Article I, Section 21 of the

Constitution of the State of Indiana includes the following:

> No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

A similar issue was the subject of the recent unanimous opinion of the Supreme Court of the United States in Webb's Fabulous Pharmacies, Inc. v. Beckwith (1980), 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358.

The Webb's case involved a dispute over interest earned on an interpleader fund deposited with a Florida circuit court while creditor's rights were being litigated. It held unconstitutional a Florida statute providing that all interest accruing from invested monies deposited with the court would become income to the office of the clerk of the circuit court. The decision in Webb's

was expressly limited in application.

> We hold that under the narrow circumstances of this case--where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concedely is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others--Seminole county's taking unto itself, under Section 28.33 and 1973 FLA Laws, ch 73-282, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders.

449 U.S. at 164, 165, 101 S.Ct. at 452, 66 L.Ed.2d at 367. Preceding this narrow limitation of its holding, however, the opinion reasoned that when the deposited funds are strictly private in nature,

and deposited with the court either voluntarily, by stipulation, or by order of the court, such funds retain their status as private funds. Any interest accrued on the funds in excess of any authorized fee charged by the clerk's office "follows the principal and is to be allocated to those who are ultimately to be the owners of that principal". 449 U.S. at 162, 101 S.Ct. at 451, 66 L.Ed.2d at 365. "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property". 449 U.S. at 164, 101 S.Ct. at 452, 66 L.Ed.2d at 366.

Unlike the Florida statutes reviewed in Webb's, Indiana's statutes do not authorize county clerks to charge a fee for the services rendered in receiving and maintaining appeal bond

funds.[1] Thus, while the express holding in Webb's is not determinative in the case at bar, we find that its reasoning applies. The appeal bond was clearly private in nature, and any resulting interest earnings must follow the principal and be distributed to the ultimate owners of the fund.

The language of Ind. Code § 5-13-1-3.5(b) is not an unrestricted authorization to invest all funds. The act only allows the clerk to invest any or all of "his" total moneys on deposit. The constitutionality of the statute may

---

[1]We approve of the Court of Appeals' rejection of the Petitioner's argument that, because it never extracted a fee for the investment services it rendered, the $34,440.43 should be retained by the county as payment for management of the fund. However, current Indiana law does not expressly authorize such a fee, and we cannot imply such authorization in I.C. § 5-13-1-3.5(b).

be upheld and reconciled with the Webb's rationale by construing the phrase "his total moneys", as used in Ind. Code § 5-13-1-3.5(b), to be equivalent to the term "public funds" as defined in Ind. Code § 5-12-1-1:

> (e) "Public funds" means and includes funds coming into the possession of the treasurer of state, treasurer of the board of trustees of any state benevolent, penal or educational institution, all funds coming into the possession of any state officer by virtue of such office, and all funds coming into the possession of any local officer by virtue of such office, but shall not mean nor include funds coming into the possession of any public officer which are not impressed with a public interest nor designed for a public use. However, the term "public funds" shall mean and include all fees and funds of whatever kind or character received by judges or clerks of city courts by virtue of their

offices.[2] (Emphasis added)

Such interpretation is consistent with the Webb's distinction between funds which are strictly private and those which possess substantial ancillary benefits to the court or county. In Webb's, the subject fund was described as follows:

> It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors.

449 U.S. at 161, 101 S.Ct. at 451, 66 L.Ed.2d at 365. Thus construed to permit retention of interest earned on de-

---

[2]We note that the second sentence of the statute applies only to monies received by judges and clerks of city courts. We need not address whether interest earned on an appeal bond posted in a city court must follow the principal because the authorization to invest provided in I.C. § 5-13-1-3.5(b) expressly applies not to city courts but only to "the clerk of any circuit court."

posited funds designed for a public use or impressed with a public interest, as distinguished from strictly private funds, Ind. Code § 5-13-1-3.5(b) passes constitutional muster.

By way of illustration, we observe that private funds such as those deposited in court pending resolution of conflicting claims thereto, or those deposited to protect a private party against loss pending further adjudication, are not within the meaning of "public funds" which the clerk may deposit and earn interest inuring to the county.[3] In contract, such investment is permitted for fees, fines, penalties and forfeitures which are "designed for a public use."

---

[3]In individual cases, a trial court, in the exercise of its inherent authority, may order the clerk to deposit private funds in an interest bearing account.

The same is true of bail bonds and criminal appeal bonds which serve to preserve the power, fairness and integrity of the criminal justice system. These are "impressed with a public interest", and thus may be considered "public funds" within the statutory authorization for investment by the clerk. Similarly, we view funds deposited for remittance as child and spousal support payments as substantially impressed with a public interest as evidenced by the continuing jurisdiction of courts in dissolution and support matters, and in statutes which impose criminal penalties for non-support of children and spouses.[4] Such funds may thus be deposited in interest-bearing accounts and the interest retained by the county pursuant to Ind. Code §

---

[4]See Ind. Code §§ 35-46-1-5, 6.

5-12-1-1.

By our decision in this case, we do not hold that a county is prohibited from investing and retaining interest from unclaimed funds received as payment of judgments or pursuant to proceedings supplemental. The applicable constitutional proscriptions apply to private property "taken". Where a person entitled to his private funds elects to allow such funds to remain in the care of the clerk, he is not subjected to an unconstitutional "taking," and is not entitled to interest earned thereon.

We agree with the Court of Appeals that Spencer County's retention of interest earned on the U.M.W. appeal bond constituted an impermissible taking. However, we further hold that Ind. Code § 5-13-1-3.5(b) is constitutional when applied to funds designed for a public

use or impressed with a public interest.

Transfer granted and judgment reversed.

GIVAN, C.J., and DeBRULER and PIVARNIK, JJ., concur.
SHEPARD, J., dissents, as he does not regard the procedure invalidated today as constituting a taking under the Fifth Amendment.

Filed December 12, 1986 with the Clerk of the Indiana Supreme and Court of Appeals.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE SPENCER COUNTY CLERK,
SPENCER COUNTY AUDITOR,
SPENCER COUNTY COUNCIL, and
the SPENCER COUNTY BOARD
of COMMISSIONERS,
Petitioners

v.

B & M COAL CORPORATION,
Respondent

and

UNITED MINE WORKERS OF
AMERICA and DAVID R. NORRICK,
Individually and as a Member
of the United Mine Workers
of America,
Respondents

OPINION OF COURT OF APPEALS
OF INDIANA OF JULY 8, 1985

ATTORNEY FOR APPELLANT:

DENNIS M. STARK
201 Washington Street
P.O. Box 1942
Columbus, Indiana 47202-1942

RICHARD S. EYNON
RICHARD S. EYNON, P.C.
555 First Street
P.O. Box 1212
Columbus, Indiana 47202-1212

ATTORNEYS FOR APPELLEES:

JACK R. ROBINSON
122 South Third Street
Rockport, Indiana 47635

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

No. 4-884 A 231[1/]

1/ This case was diverted from the Fourth District by order of the Chief Judge.

B & M COAL CORPORATION,

Plaintiff-Appellant,

vs.

UNITED MINE WORKERS OF AMERICA and DAVID R. NORRICK, Individually and as a Member of the United Mine Workers of America et al,

Defendants,

THE SPENCER COUNTY CLERK, SPENCER COUNTY AUDITOR SPENCER COUNTY COUNCIL, and the SPENCER COUNTY BOARD OF COMMISSIONERS,

Intervenors-Appellees.

APPEAL FROM THE SPENCER CIRCUIT COURT
The Honorable Edward C. Theobald,
Special Judge
(Cause No. C 77-261)

RATLIFF, P.J.

STATEMENT OF THE CASE

B & M Coal (B & M) appeals from an adverse decision of the trial judge, after a bench trial, denying its claim

for interest which accrued on an appeal bond. We reverse.

FACTS

The present dispute is between Spencer County (County) and B & M but it arose out of litigation initiated by B & M against the United Mine Workers (U.M.W.). In December 1977, a labor dispute arose between B & M and its employees affiliated with U.M.W. The U.M.W. called a nationwide strike paralyzing coal mining in Indiana except for non-union operations along the Ohio River. These non-union operations precipitated unprovoked harassment from the union and B & M obtained a temporary restraining order to protect the workers. On January 7, 1978, B & M was raided by approximately 400 to 500 individuals, in violation of the court order, who caused extensive property damage to the premises.

B & M sued the 191 people arrested at the scene and recovered a $173,873.09 judgment plus $10,117.72 in fees. The defendants sought to stay enforcement pending appeal and the court granted the stay on condition that $200,000 be deposited as an appeal bond. The U.M.W. and union members deposited a total of $160,363.00 with the clerk. The Fourth District Court of Appeals affirmed the decision in part but remanded for a further hearing on damages. Cause number 1-379 A 63. Ultimately, B & M received a total judgment of $222,232.43.

The original deposit of $160,363 by the defendants was invested by the Spencer County Clerk from May 1979 to the time of the bench trial in May 1984. Until 1982, all interest accruing on the fund was deposited by the clerk into the County general fund pursuant to stat-

utory authorization. On February 24, 1982, the court ordered that from this date interest accruing must be returned to the fund. From February 1982 on, interest accordingly was added to the principal and as of the date of the bench trial the bond totalled $191,876.97 which has since been paid to B & M. However, the balance of the judgment remains unpaid and uncollectible.

The parties agree that the only amount at issue is $34,440.43 which represents accrued interest from 1979 until the court's 1982 order. At the 1984 bench trial, B & M argued this amount belonged to it because of its unsatisfied judgment. However, the trial court agreed with the county, which intervened in 1982, and found the $34,440.43 belonged to the county pursuant to a provision in the Indiana Code. B & M now

appeals this judgment.

ISSUE

Due to our decision we need address only the single issue of whether Indiana Code section 5-13-1-3.5(b), which allows a county to retain interest accrued on funds deposited with the county clerk, violates the constitutional proscription against governmental appropriation of private property without just compensation or due process.

DISCUSSION AND DECISION

Indiana Code section 5-13-1-3.5(b) provides that the Clerk of the county may invest any and all monies deposited with him into interest bearing accounts in local banks.

> "(b) The Clerk of any Circuit Court of this state may invest any or all of his total monies on deposit. He shall invest this money in any or all of the kinds of investments permitted in this chapter. He shall credit

> interest on these investments to the County general fund of his County."

This statute represents the authority under which the Spencer County Clerk acted when she invested the money from the cash bond and ultimately deposited the interest accruing from 1979 to 1982 in the general county fund. It is the constitutionality of this statute, as it was applied in this case, which is before this court.

Both the United States and Indiana Constitutions prohibit the government from taking private property unjustly.[2/]

2/ U.S. const. amend 5 states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . ., nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

without just compensation."

U.S. const. amend 14 states:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ind. const. art. 1 § 21 states:

"No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

Since, as a general rule, interest follows principal, our inquiry necessarily begins with determining the extent to which B & M had a protectable property interest in the fund deposited with the clerk. Webb's Fabulous Pharmacies, Inc. v. Beckwith (1980), 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358. Generally, the dimensions of particular property interests stem from state law. "[A] mere unilateral expectation or an abstract need is not a property interest. [Citation omitted.]" Id. The fund deposited in the present case represented an appeal bond which suspended enforcement of the judgment pending appellate review. Indiana Rules of Procedure, Trial Rule 62 (D); Dzur v. Northern Indiana Public Service Company (1972), 257 Ind. 674, 676, 278 N.E. 2d 563, 564-65; Western & Southern Life Insurance Company v.

Lottes (1945), 116 Ind. App. 559, 562, 63 N.E.2d 146, 147. The purpose of the fund was to insure B & M's judgment if the appellant's failed on appeal. In short, the fund would go to B & M if it could persuade the appellate courts to affirm the trial court's judgment. Therefore, B & M had more than a unilateral expectancy or abstract need because the principal represented a debt owing B & M by virtue of the trial court's judgment.

Although during the period in question the ownership of the fund was uncertain, B & M still had a sufficient property interest in the fund. In Webb's, the Supreme Court determined that interest, which accrued on an interpleader fund while creditor's rights were being litigated, should follow the fund. In that case, Eckerds, Inc. offered to buy

Webb's Fabulous Pharmacies but the tendered purchase price was insufficient to cover Webb's existing indebtedness. Consequently, Eckerd's interpleaded the purchase price pursuant to Florida law and a receiver was appointed to determine the claims of creditors who filed against the fund. While the money was in the clerk's hands he invested it in interest bearing accounts. Later, the clerk delivered only the principal to the receiver keeping the interest for the county pursuant to Fla. Stat. § 28.33.[3/]

3/ Fla. Stat. § 28.33 states:

> "The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United

States in compliance with federal laws relating to receipt of and withdrawal of deposits. . . . Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. . . . <u>All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court</u> investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year. (Emphasis supplied.)"

The Supreme Court unanimously held that expropriation of the interest was unconstitutional. The Court found the creditors had a protectable property interest in the fund despite the fact that they were not immediately entitled to it.

> "It is true . . . that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. [Citation omitted.] That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim."

Webb's at 161-62, 101 S. Ct. at 451, 66 L. Ed. 2d at 365. Similarly, although B & M had no immediate right to the appeal bond money, its purpose was to secure B & M's recovery if it ultimately prevailed. B & M has ultimately prevailed and consequently, the

Webb's analysis leads us to conclude B & M possessed a protectable property interest in the appeal bond despite the fact that recovery was, for a time, uncertain.

We now turn to the question of whether B & M had a protectable property interest in the $34,440.43 in accrued interest. In Webb's, the court found that one who has an interest in the principal necessarily has an interest in the fruit from that principal. In other words, interest follows principal. Webb's at 162, 101 S. Ct. at 451, 66 L. Ed. 2d at 365. Added to this are the unique circumstances of this case where the appeal bond's principal is insufficient to satisfy the judgment. Under Indiana law, the right to recover on a civil judgment is a property right. Griffin v. Wilcox (1863), 21 Ind. 370,

373. As it stands, the appeal bond's principal is insufficient to satisfy a judgment and interest accrued from that principal, sufficient to make B & M whole, is put out of B & M's reach. The fact that interest follows principal together with B & M's right of recovery establishes its property interest in the $34,440.43 of accrued interest.

With recognition of B & M's protectable property interest we now consider whether the Spencer County Clerk's retention of the interest constituted an uncompensated taking without due process. In cases such as this, where the governmental interference is an expropriation of property, there is clearly a taking under the constitution. Loretto v. Teleprompter Manhattan C A T V Corp. (1982), 458 U.S. 419, 427 n.5, 102 S. Ct. 3164, 3171, 73 L. Ed. 2d 868, 876-77

quoting from Michelman, Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law 80 Harv. L. Rev. 1165, 1184 (1967). In the present case, the county government expropriated what was undeniably private property. Under no set of circumstances would the county ever be entitled to the bond principal. The bond was private property belonging to a private party. Because the bond was private property, interest accruing thereon was necessarily private property notwithstanding Ind. Code § 5-13-1-3.5 (b). Webb's at 164, 101 S. Ct. 452, 66 L. Ed. 2d at 366-67. The state may not transform private property into public funds by legislation. Id. This is the very thing the Taking Clause in the constitution was intended to prohibit as an arbitrary exercise of governmental

power. Id. When the government physically takes possession of exclusively private property or money, the party entitled to the property or money must be justly compensated therefor unless the government is able to justify such taking as either an appropriate regulation of the property's use, Andrus v. Allard (1979), 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210, or payment of an amount lawfully owed the government, Webb's. Nowak, Constitutional Law, West Hornbook Series, p. 492-93 n.66 (2d Ed. 1983).

The county argues that retention of the accrued interest is compensation for time and manpower expended by the county clerk's office in managing the fund from 1979 to 1982. Therefore, the county contends that keeping the interest was payment of an amount lawfully

owed the government. To support its position, the county points to the narrow language of the Court's holding in Webb's. The Webb's Court pointed out that under Florida law a clerk may retain a calculated amount of money deposited in his registry as compensation for services rendered. In Webb's the clerk appropriated the statutory percentage for his services but also retained the balance of the interest on the theory that it constituted public funds. The court concluded that because the clerk had already exacted payment for services pursuant to state law, the balance of the interest retained as public funds was unconstitutional.

> "We hold that under the narrow circumstances of this case--where there is a separate and distinct state statute authorizing a clerk's fee 'for services rendered' based upon the amount of principal deposited; where the deposited fund

> itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others--Seminole County's taking unto itself, under § 28-33 and 1973 Fla. Laws, ch. 73-282, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders. [Emphasis supplied.]"

Webb's at 164-65, 101 S. Ct. 452-53, 66 L. Ed. 2d 367. The County argues that because it never exacted a fee for the investment services it rendered, the $34,440.43 should be retained by the county as payment for management of the fund. We disagree.

Our reading of the applicable statutes concerning clerk's fees leads us to

conclude the type of services rendered by the Spencer County Clerk in this case were meant to be provided at public expense. Indiana Code section 33-17-2-7 states:

> "(a) The Clerk shall keep in his office and open to public inspection a book to be known as the official bond index record.
>
> "(b) In the official bond index record the Clerk shall keep, in alphabetical order, an index of the names of all sureties on any and all bonds of every description filed in his office, indicating the character of such bond upon which such surety appears and a reference to the book and page where such bond is recorded.
>
> "(c) The official bond index record shall be procured by the Clerk at the expense of the county. [Emphasis supplied.]"

Appeal bond record keeping is clearly mandated to be done at public expense. In the absence of any other more specific statute addressing management

of funds held by the clerk[4/] we are persuaded such management, including investment of the bond, does not entitle the clerk to a fee. Because we find state law does not authorize a fee for the clerk's services, retention of the interest in the present case was just as improper as it was in Webb's. Therefore, expropriation of the interest cannot be justified as an amount lawfully due the county and retention of $34,440.43 in the county fund represents an impermissible taking under the Indiana and United States Constitutions.

Judgment reversed.

NEAL, J. and ROBERTSON, J., concur.

4/ The applicable statutes authorizing clerk's fees are contained in Indiana Code 33-17. Nothing in this entire article of the code authorizes a fee for services remotely comparable to management of funds deposited with the clerk.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE SPENCER COUNTY CLERK,
SPENCER COUNTY AUDITOR,
SPENCER COUNTY COUNCIL, and
the SPENCER COUNTY BOARD
of COMMISSIONERS,
Petitioners

v.

B & M COAL CORPORATION,
Respondent

and

UNITED MINE WORKERS OF
AMERICA and DAVID R. NORRICK,
Individually and as a Member
of the United Mine Workers
of America,
Respondents

JUDGMENT OF SPENCER CIRCUIT
COURT ENTERED ON May 24, 1984

STATE OF INDIANA)
) SS:
COUNTY OF SPENCER)

IN THE SPENCER CIRCUIT COURT

CAUSE NO. C-77-261

B & M COAL CORPORATION,
Plaintiff

vs.

UNITED MINE WORKERS OF AMERICA and DAVID R. NORRICK, individually and as a Member of the United Mine Workers of America et al.,
Defendants

and

THE SPENCER COUNTY CLERK, SPENCER COUNTY AUDITOR, SPENCER COUNTY COUNCIL, and the SPENCER COUNTY BOARD OF COMMISSIONERS,
Introvenors

(Judgment entered on 5-24-84)

Comes now plaintiff by counsel, Richard Eynon and Dennis Stark.

Comes now defendant by counsel, David Kelly and comes now Spencer County Auditor, Board of Commissioners and Spencer Circuit Court Clerk by Jack R. Robinson.

Court holds hearing on issue of interest earned on appeal bond and finds that county shall retain the amount of interest earned, from 2-27-79, the date the cash bond was deposited, to 2-19-82, the date of Judge Plummer's order in the amount of $34,440.43.

Court holds hearing on issue of damages and finds the amount of damages to be $124,039.58 plus interest at 8% from the date of original judgment. Court finds attorneys fees due in amount of $10,117.72 plus interest at 8% from date of original judgment in the amount of $4,592.61. Court finds Eynon & Stark's attorney fees due in the amount

of $15,765.00 which includes time for travel & trial this date totaling $210,818.68.

Court takes under advisement the matter of attorney fees for Habbert W. Kunz until Court receives a more detailed statement for fees showing what services were rendered and time allotted to tasks.

Court finds judgment in favor of Plaintiff and against defendant in the amount of $210,818.68.

/s/Edward C. Theobald,
Special Judge

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE SPENCER COUNTY CLERK, SPENCER COUNTY AUDITOR, SPENCER COUNTY COUNCIL, and the SPENCER COUNTY BOARD of COMMISSIONERS,
Petitioners

v.

B & M COAL CORPORATION,
Respondent

and

UNITED MINE WORKERS OF AMERICA and DAVID R. NORRICK, Individually and as a Member of the United Mine Workers of America,
Respondents

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

STATE OF INDIANA, COUNTY OF SPENCER, SS:

I, Jack R. Robinson, the attorney for The Spencer County Clerk, Spencer County Auditor, Spencer County Council, and the Spencer County Board of Commissioners, Petitioners herein, and an applicant for membership to the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of March, 1987, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On B & M COAL CORPORATION, respondent, by mailing three (3) copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

BEST AVAILABLE COPY

TO: Dennis M. Stark, Esq.,
Attorney for B & M Corporation
201 Washington Street
P.O. Box 1942
Columbus, Indiana 47202-1942

TO: Richard S. Eynon, Esq.
Attorney for B & M Corporation
555 First Street
P.O. Box 1212
Columbus, Indiana 47202-1212

2. On UNITED MINE WORKERS OF AMERICA and DAVID R. NORRICK, Individually and as a Member of the United Mine Workers of America, respondents, by mailing three (3) copies in a duly addressed envelope, with first class postage prepaid, to their respective attorney of record, as follows:

TO: David O. Kelley, Esq.,
Attorney for United Mine Workers
of America
103 West Main Street
P.O. Box 592
Boonville, Indiana 47601

JACK R. ROBINSON
Attorney for Petitioners
122 South Third Street
Rockport, Indiana 47635
Telephone No. (812) 649-5011

Supreme Court, U.S.
FILED
APR 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1564

In The

Supreme Court of the United States

October Term, 1986

THE SPENCER COUNTY CLERK, SPENCER COUNTY AUDITOR, SPENCER COUNTY COUNCIL, AND THE SPENCER COUNTY BOARD OF COMMISSIONERS,

Petitioners,

v.

B & M COAL CORPORATION,

Respondent,

and

UNITED MINE WORKERS OF AMERICA AND DAVID R. NORRICK, INDIVIDUALLY AND AS A MEMBER OF THE UNITED MINE WORKERS OF AMERICA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD S. EYNON
RICHARD S. EYNON, P.C.
555 First Street
P. O. Box 1212
Columbus, IN 47202-1212
Telephone: (812) 372-2508
Attorney for Respondent

DENNIS M. STARK
Counsel of Record
201 Washington Street
P. O. Box 1942
Columbus, IN 47202-1942
Telephone: (812) 372-9780
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Case	1
Summary of Argument	2
Argument	3
SPENCER COUNTY'S RETENTION OF INTEREST MONIES CONSTITUTES A VIOLATION OF B & M's DUE PROCESS RIGHTS	3
Conclusion	15

TABLE OF AUTHORITIES

Page

CASES

Board of Commissioners of Howard County v. Kokomo City Plan Commission (1975) 263 Ind. 282, 330 N.E.2d 92 4

Board of Regents of State Colleges v. Roth (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 5

Davis v. Ball Memorial Hospital Assocation (1980) 640 F.2d 30 5

Eichman v. Indiana State University Board of Trustees (1979) 597 F.2d 1104 4

Griffin v. Wilcox (1863) 21 Ind. 370 6

Jeffries v. Turkey Run Consolidated School District (1974) 492 F.2d 1 4

Lutheran Hospital of Fort Wayne, Inc. v. Department of Public Welfare of Allen County (1979) — Ind. App. —, 397 N.E.2d 638 4

McMillan v. Robeson County (1964) 262 N.C. 413, 137 S.E.2d 105 13

Natural Resources Commission of Department of Natural Resources v. Sullivan (1981) — Ind. App. —, 428 N.E.2d 92 6

School Corporation of Andrews v. Heiney (1912) 178 Ind. 1, 98 N.E. 628 7

Sellers v. Harris County (1972) 483 S.W.2d 442 13

Webbs Fabulous Pharmacies v. Beckwith (1979) 374 So.2d 951 11

Webbs Fabulous Pharmacies v. Beckwith (1980) 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 ..... 11, 12, 13, 14

TABLE OF AUTHORITIES—Continued

Page

STATUTES

U.S. Constitution, Fifth Amendment 3, 12

U.S. Constitution, Fourteenth Amendment, Section I 3, 12, 13

Indiana Constitution, Section 21, Article I 3

Indiana Rules of Trial Procedure,
Trial Rule 62, 62(D)(2) 5, 6, 7
Trial Rule 67 7

Indiana Rules of Appellate Procedure,
Appellate Rule 6 7

I.C. 5-13-1-3.5(b) 11, 15

I.C. 33-1-11-1 10

I.C. 33-1-11-6 9

I.C. 33-15-12-1 9

I.C. 33-17-1-1 *et seq.* 9

I.C. 33-17-1-6 9

I.C. 33-17-2-7 9

I.C. 33-17-4 9

I.C. 33-17-5-8 9

I.C. 33-17-6-2 10

Florida Statute, Section 28.33 ..... 11, 12

STATEMENT OF CASE

The respondent, B & M Coal Corporation, agrees with the Statement of the Case and the Statement of Facts material to the issue provided by the petitioner. The following facts are relevant to this issue, however, and were omitted from petitioner's Statements.

As stated by petitioner, the interest money retained by Spencer County in the amount of $33,440.43 was paid into the county general fund prior to the Spencer County Circuit Court's Order of February 24, 1982. However, that money has been reappropriated by the county for repayment on an annual basis (Record, p. 202).

Reference was made in petitioner's Statement of Facts to work which the Clerk was required to do after Spencer County intervened in this case on April 20, 1982. (Petition, p. 22). The reference to the Clerk being "required to confer with attorneys, State Board of Accounts, give a deposition, appear before the County Commissioners, testify in Court and numerous other matters all relating to the appeal bond" does not apply to services rendered by the Clerk concerning the investment of the appeal bond. Rather, this refers to efforts made on behalf of Spencer County to retain the money which they appropriated without the consent of either plaintiffs or defendants to the original lawsuit. (Record, p. 190).

To date, B & M Coal Corporation has received $191,876.97 toward the payment of its judgment of $222,232.43, leaving $30,355.46 plus accrued interest unpaid.

———o———

SUMMARY OF ARGUMENT

The issue before the Court is whether Spencer County's unauthorized retention of interest money earned on an appeal bond, deposited with the Spencer County Clerk, violates the constitutional proscription against governmental appropriation of private property with just compensation or due process.

B & M Coal Corporation argues that the decisions of the Indiana Court of Appeals, First District and the Indiana Supreme Court are correct. B & M had a protectable property interest in the bond money and all interest earned thereon. The bond was originally posted to guarantee the satisfaction of B & M's judgment, plus cost, interest and damages for delay. The only way that B & M Coal Corporation's judgment could ever be protected and paid would be for all interest on the original bond to be repaid as ordered. This rule would apply, however, regardless of the actual amount of the bond paid, due to the uncertainty of the length of the appellate process and the fact that interest continues to accrue on a judgment during the time that the appeal is processed.

Spencer County, acting under the apparent authority of I.C. 5-13-1-3.5(b) has deprived B & M Coal Corporation of money which could and should have been used to satisfy its ultimate judgment against the defendants. The county did so without notice to the parties hereto or the Court. As such, it developed and maintained a prohibitive interest in this lawsuit. The longer that litigation continued and the bond was left with the Clerk, the more money the

county stood to receive. The County's acts are, therefore, unconstitutional.

———o———

ARGUMENT

SPENCER COUNTY'S RETENTION OF INTEREST MONIES CONSTITUTES A VIOLATION OF B & M'S DUE PROCESS RIGHTS

The *Fifth Amendment to the United States Constitution* provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . ., nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section I of the Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 21 of the Indiana Constitution provides as follows:

> No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except

in case of the State, without such compensation first assessed and tendered.

The foregoing sections of the Federal and State Constitutions have been held to prevent the State from exercising, by way of any of its departments, arbitrary and capricious power over persons or property. *Jeffries v. Turkey Run Consolidated School District* (1974) 492 F.2d 1. Further, these constitutional guarantees have been construed to provide that a person may not be deprived of his property or the use thereof without due process of law. *Eichman v. Indiana State University Board of Trustees* (1979) 597 F.2d 1104.

Before a person can raise a constitutional objection to a statute, he must demonstrate that some right of his is impaired or prejudiced by the statute. *Board of Commissioners of Howard County v. Kokomo City Plan Commission* (1975) 263 Ind. 282, 330 N.E.2d 92. For standing under the Federal Constitution, the standard has further been defined as whether a party has alleged such a personal stake in the outcome of litigation as to insure concrete adverseness which sharpens the presentation of issues and on which a court largely depends for elimination of difficult constitutional questions; furthermore, a party must just show that it is injured by the challenged action. *Lutheran Hospital of Fort Wayne, Inc. v. Department of Public Welfare of Allen County* (1979) — Ind. App. — 397 N.E.2d 638.

B & M has standing under both the Federal and State constitutional provisions to challenge the constitutionality of Spencer County's acts in retaining the interest money earned on the appeal bond. B & M had received a judg-

ment ultimately from the named defendants in this suit totaling $222,232.43. The original amount of the bond money posted was only $160,363.00. There had been an accrual of interest to this original bond after February 24, 1982, making the total received by B & M in partial satisfaction of their judgment of $191,876.97. Consequently, B & M has been shortchanged by at least $30,000.00 in the payment of their judgment. The retention of the additional interest monies earned on the bond by Spencer County has directly caused this shortcoming. The bond and earned interest would have otherwise been sufficient to satisfy B & M's ultimate judgment. This shortcoming subjects B & M to the uncertainties and other problems associated with trying to collect a large sum of money from numerous, scattered and often insolvent individuals. The original appeal bond was posted for the purpose of protecting B & M's judgment for the costs, interests and damages for delay inherent in an appeal. See, *Trial Rule 62(D)(2)* of the Indiana Rules of Trial Procedure. Spencer County's actions have undermined the guarantees intended by this Trial Rule and have directly impaired protections owed to this plaintiff. Therefore, standing exists to raise the constitutional question.

For the protection of the due process clause of the Federal and State Constitutions to apply, an individual must have a protectable property interest. *Davis v. Ball Memorial Hospital Association* (1980) 640 F.2d 30. A protectable property interest is created and its dimensions are defined by existing rules or understands that stem from an independent source, such as state law. *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548. Further, a protectable property in-

terest may arise from a statute. *Natural Resources Commission of Department of Natural Resources v. Sullivan* (1981) — Ind. App. —, 428 N.E.2d 92. It has been held by Indiana courts that a right to recover damages for an injury constitute property in due process clause adjudications. *Griffin v. Wilcox* (1863) 21 Ind. 370.

In establishing the existence of a protectable property interest, B & M employs an argument very much akin to that used in establishing its standing to assert the constitutional questions. As noted above in *Griffin,* B & M's right to damages for injuries is a protectable property interest. In light of this existing authority and the express terms of *Trial Rule 62(D)(2)* of the Indiana Rule of Trial Procedure, B & M asserts that it has a bona fide, protectable, property interest in the appeal bond posted by the defendants herein and all interest monies earned on that original bond. *Trial Rule 62(D)(2)* provides in part that:

> Whenever an appellant entitled thereto desires a stay on appeal, he may present to the appropriate court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and

for good cause shall affix a different amount or orders security other than the bond.

Since B & M's right to sue and recover damages for injuries is a protectable property interest, then its interest in the appeal bond and the interest earned thereon specifically posted to protect its interest in a judgment awarding damages can be no less protected.

For a violation of the due process protections to be found, there must occur a "taking or deprivation" of B & M's property rights. This certainty occurred when the County, without notice or opportunity for hearing, began taking the interest money earned on the original appeal bond. An actual interference with or disturbance of property rights, not causing a merely consequential or incidental injury, constitutes a "taking" within the due process guarantee. *School Corporation of Andrews v. Heiney* (1912) 178 Ind. 1, 98 N.E. 628. Such surely occurred here.

The original trial court and the Court of Appeals has jurisdiction over stays of execution and appeal bonds. See, *Trial Rule 62* of the Indiana Rules of Trial Procedure and *Appellate Rule 6* of the Indiana Rules of Appellate Procedure. The Spencer County Clerk did not have the authority to withdraw any monies whatsoever from the accounts in which the bond is invested, including but not limited to any interest monies which might be earned, without prior court approval. The provisions of *Trial Rule 67,* of the Indiana Rules of Trial Procedure would show by analogy how the appeal bond monies should be processed. This rule provides in Section (A) the following:

"Payment of all or part thereof (referring to a deposit in court before judgment) may be directed by

> the court under any judgment or order, or motion and hearing to the rightful owners or upon security or agreement of the parties under the direction of the court."

Spencer County had no legally cognizable interest in the bond money and the interest earned thereon. The only parties with a protectable property interest in these monies were the plaintiff and perhaps the defendants. The plaintiff's interest arose as a result of their judgment and the existence of the bond. The defendants' interest could possibly arise as a result of their expectation of a return of money to them should the amount of the bond exceed the actual amount of the judgment and other costs assessed. Consequently, a "taking or deprivation" of the parties protected property interest in the interest money has occurred. The only possible reason that Spencer County can claim for keeping the interest is that the money withheld repaid the County for supervising the investment of the appeal bond herein. Such an argument is unfounded in statute or case law. The County is attempting to profit from its fiduciary responsibility in safeguarding the appeal bond herein. Such profit is not right.

Monies were received and processed by the Spencer County Clerk's Office and the interest earned on investment paid to the County between the time period of February 27, 1979 and the first part of February, 1982. During this period of approximately 36 months, the Spencer County Clerk's Office routinely invested the money in certificates of deposit, received interest checks, maintained their own ledger books and reconciled their records with the bank records on the flow of monies and had a small

amount of conversation with bank personnel and other persons about the investment of this money.

A description of Circuit Court Clerk's duties and court fees is found in *I.C. 33-17-1-1* et seq. *I.C. 33-17-2-7* provides that:

> (a) The Clerk shall keep in his office and open to public inspection a book to be known as the official bond index record.
>
> (b) In the official bond index record the Clerk shall keep, in alphabetical order, an index of the names of all sureties on any and all bonds of every description filed in his office, indicating the character of such bond upon which such surety appears and a reference to the book and page where such bond is recorded.
>
> (c) The official bond index record shall be procured by the Clerk at the expense of the county. (This section recodified the former statutes found at *I.C. 33-15-12-1).*

Under this statute and its predecessors, there is no mention of a separate fee to be charged for these routine services.

A further constraint on the imposition of fees by the Spencer County Clerk is found at *I.C. 33-17-1-6.* This statute provides that:

> A Clerk shall post in a conspicuous place in his office a table of his fees. If he fails to post a table of fees, a Clerk is not entitled to demand or receive fees for services that he renders. (This statute recodifies the former statute *(I.C. 33-1-11-6).*

Finally, *I.C. 33-17-5-8* provides as follows:

> For his services in a proceeding not specifically provided for in this chapter or in *I.C. 33-17-4,* the Clerk shall charge and collect the same service fee as is pre-

> scribed in this chapter for similar proceedings. (This statute is a recodification of the last section of former statute *I.C. 33-1-11-1)*.

The Spencer County Clerk is not authorized to withhold or charge fees for its management of appeal bonds. There is no provision for the charging of such a fee under current or former statutes. When one reviews the duties of the Clerk, it is clear that this is something that she is required to do by statute and for which she is compensated by salary. Likewise, her staff is compensated by salary for their efforts in this area. Should the Clerk be compensated for her services herein, the statute limits the charge to that prescribed for similar services. B & M would argue that the activities which most closely resemble that performed by the Clerk in this matter would be receipting in child support payments and the subsequent payment of these amounts to custodial parents. This latter activity involves comparable management of money, bookkeeping and issuance of receipts. The only difference is that support payments are generally handled on a weekly basis and the interest payments received from the appeal bond were generally processed monthly. In terms of the total hours of work necessary to handle these types of accounts, it would appear that a child support account would likely involve more time than that required for the management of the appeal bond. The fee for managing child support accounts was instituted in 1984 and is currently the sum of $15.00 per calendar year. See, *I.C. 33-17-6-2.* During the time that the appeal bond was being invested by the County Clerk, there was no charge for the Clerk's services in managing support accounts.

The foregoing analysis of the Clerk's duties and the fees which she can charge shows very clearly that the monies withheld by Spencer County in this matter were not intended to be and cannot be construed to be fees for services rendered. Therefore, the money in question was "taken" for purposes of due process analysis.

All interest earned on the appeal bond prior to the court's order of February 24, 1982 went into the County's general revenue fund, allegedly pursuant to *I.C. 5-13-1-3.5(b)*. This statute reads as follows:

> (b) The Clerk of any Circuit Court of this state may invest any or all of his total monies on deposit. He shall invest this money in any or all of the kinds of investments permitted in this chapter. He shall credit interest on these investments to the County general fund of his County.

The Supreme Court of the United States had the occasion to discuss a similar statute in the case of *Webbs Fabulous Pharmacies v. Beckwith* (1980), 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358. In an opinion written by Justice Blackmun, the court held that a very similar Florida statute allowing the Clerk of the Circuit Court to retain interest money earned on monies deposited was unconstitutional.

The *Webbs* case involved the deposit of monies into the Circuit Court Clerk's office in conjunction with the filing of a complaint of interpleader in that court. The Clerk deducted from the interpleader various amounts of interest pursuant to Florida Statute Section 28.33. This statute reads in part:

> Monies deposited in the registry of the court shall be deposited in interest bearing certificates at the direction of the Clerk, subject to the above guidelines . . . all interest accruing from monies deposited shall be deemed income of the office of the Clerk of the Circuit Court investing such monies and shall be deposited in the same accounts as are other fees and commissions of the Clerk's office. Each Clerk shall, as soon as is practicable after the end of the fiscal year, report to the County governing authority the total interest earned on all investments during the preceding year. *Webbs,* 101 S.Ct. 446, 448.

During the course of this litigation, the Clerk in the *Webbs* case retained interest exceeding $90,000.00. The argument was raised in *Webbs* that the retention of the money by the County Clerk was unconstitutional, being in violation of the Fifth and Fourteenth Amendments of the United States Constitution. The trial court agreed with this argument and ordered the monies returned by the Clerk. However, the Florida Supreme Court in a per curiam opinion ruled that Florida Statutes Section 28.33 was constitutional and reversed the judgment of the Circuit Court. See, *Webbs Fabulous Pharmacies v. Beckwith* (1979), 374 So.2d 951. The rationale behind this opinion was that a fund so deposited is considered "public money" from the date of deposit until it leaves the account; that the statute takes only what it creates; and that there is no unconstitutional taking because interest earned on the Clerk of the Circuit Court's registry account is not private property. 374 So.2d 951, 952-953. This matter was subsequently appealed to the United States Supreme Court which assumed jurisdiction.

The Supreme Court noted at the outset that it had held elsewhere that a County's appropriation of the in-

terest earned on private funds deposited in court in an interpleader action is an unconstitutional taking. *Webbs,* 101 S.Ct. 446, citing *Sellers v. Harris County* (1972), 483 S.W.2d 442; *McMillan v. Robeson County* (1964), 262 N.C. 413, 137 S.E.2d 105.

The Circuit Court Clerk in the *Webbs* case had deducted a fee for services rendered of $9,228.74. In addition, it retained all interest earned on the interpleader deposit, which interest exceeded $90,000.00. The Supreme Court considered only the issue of whether the retention of the interest money over and above any fees charged constituted a taking within the Fourteenth Amendment proscription. The court cited Florida law and other law in finding that the principal sum deposited in the registry of the court plainly was private property, not the property of Seminole County. *Webbs,* 101 S.Ct. 446, 450. The court continued on finding that *Webbs'* creditors, represented by the court appointed receiver had more than a unilateral expectation in the property. The fund was determined to be held only for the ultimate benefit of *Webbs'* creditors, not for the benefit of the court or County. The court further found that the lack of immediate right to claim the fund does not automatically bar a claimant ultimately determined to be entitled to all of her share of the fund from claiming a proper share of the interest. The court went on to state that the usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal. *Webbs,* 101 S.Ct. 446, 451. Finally, the Supreme Court held the statute in question to be unconstitutional finding that the County is forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole. *Webbs,* 101 S.Ct. 446, 452.

As mentioned before, the court decided only the issue before it. It expressly refrained from deciding what occurs when the interest retained is the only money earned for the services rendered. However, the findings by the court that the original fund was a private fund and that the interest on that fund followed the principal would mitigate very strongly against a contrary result in the latter situation. Indeed, the concerns expressed by the court strongly indicate that the result would be the same should a fee not have been charged by the Seminole County Clerk. The court's concern that the County officials "would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built in disincentive against distributing the principal to those entitled to it" still applies should a fee not have been paid. Likewise, the arbitrary conversion of private property into public property without compension would still exist and would still be in the words of the *Webbs* court "the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webbs,* 101 S.Ct. 446, 452.

The only differences between the *Webbs* case and the instant case is that *Webbs* involved an interpleader fund while this case involved an appeal bond and the Clerk in *Webbs* deducted monies for services rendered while the Clerk in this case has not expressly done so. The difference in the designation of the funds is inconsequential in that the purpose for the funds is exactly the same in both

cases. An interpleader fund is to be held for third persons which in the *Webbs* case turned out to be creditors. The appeal bond in this case was set aside for the protection of the judgment holder with any remaining monies to be returned to the defendant. In neither case did the state have any interest whatsoever. Both cases are further similar in that the claim of property right was not fully matured at the time the interest was withheld, but depended upon an ultimate determination as to the amount of money that each individual was to receive. Finally, both cases are similar in that the money withheld by the County bore no rational relationship to the services provided. As noted above, the reasoning used by the court in deciding the *Webbs* case mitigates very strongly against a contrary result even if the Clerk had not withheld fees. The concerns that the court voiced still exist when no fees were charged. For these reasons, B & M asserts that *Webbs* compels the determination that *I.C. 5-13-1-3.5(b)* is unconstitutional in the setting involved in the instant case.

———o———

CONCLUSION

Spencer County has wrongfully appropriated $34,440.43 of interest money rightfully belonging to B & M. This appropriation of monies works a severe injustice on B & M in that the likelihood of its receiving full compensation for the injuries inflicted upon it by defendants is severely impaired by the County's retention of these monies. The record shows that the interest monies are needed to make up the difference between B & M's judg-

ment and the amount that it has received to date. This taking constitutes a violation of B & M's due process rights. For these reasons and to prevent counties from developing and maintaining an undesirable and counterproductive interest in litigation, B & M respectfully requests that this court deny Spencer County's Petition for Writ of Certiorari.

Dennis M. Stark

Richard S. Eynon